Setia Indah Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–185–06 OF 2020
NOORIN BADARUDDIN J
5 JULY 2021

Civil Procedure — Amendment — Delay in applying for amendment — Application to amend after leave for judicial review granted — Whether applicant should be granted an extension of time — Whether amendment should be allowed in interest of justice — Whether amendment would prejudice respondent — Whether applicant was raising a new argument — Rules of Court 2012 O 53 r 3(2)

Civil Procedure — Judicial review — Stay of proceedings — Whether there were special circumstances — Whether applicant had strong merits in judicial review application — Whether applicant would suffer irreparable harm if stay not granted — Whether applicant could be compensated with damages — Whether balance of convenience in applicant's favour — Rules of Court 2012 O 53 r 3(5)

Revenue Law — Income tax — Deduction — Contribution to state government for release of Bumiputera units — Whether contribution was tax deductible — Income Tax Act 1967 ss 33(1) & 44(6)

The applicant filed and application pursuant to O 53 r 7 of the Rules of Court 2012 ('the ROC'), inter alia, for an order that the applicant was authorised to amend the notice of application, its statement under O 53 r 3(2) of the ROC and the notice of hearing for judicial review application ('the notices') ('encl 35') and an order for stay of proceedings pending the disposal of the judicial review application. The applicant, a property developer had entered into agreements with the Johore State Government whereby the applicant was required to sell the Bumiputera housing units developed by the applicant to Bumiputera purchasers. In the event the applicant was unable to meet the requirement, the Bumiputera housing units would be made available to be sold to non-Bumiputera purchasers provided the conditions in the agreements were complied with ('agreements'). Pursuant to the agreements, the applicant applied to the Johor State Government to release the Bumiputera housing units to the non-Bumiputera and for that purpose, the applicant stated that it made contribution to the Johor State Government and the latter agreed to receive the contribution from the applicant. The respondent conducted a tax audit on the applicant and issued its audit finding letter for the year of assessment ('YA')

2014 to 2017 to the applicant.The applicant responded by explaining that the contribution were payments for the purpose of releasing the Bumiputera status units. The respondent rejected the applicant's explanation and raised the impugned notice of assessment for YA 2017 and notices of additional assessment for the YAs 2014, 2015 and 2018. The respondent's decision was consequent to its position of disallowing the contribution amount for the release of the Bumiputera quota ('contribution') as a deduction in determining the applicant's income under s 44(6) of the Income Tax Act 1967 ('the ITA'). On 30 September 2020, the court granted leave to the applicant for judicial review and an interim stay of all further proceedings and effect in relation to the respondent's decision. Vide encl 35, the applicant sought to amend the notices by inserting a paragraph alternatively praying for a declaration that the contribution was also deductible under s 33(1) of the Income Tax Act 1967. The applicant also sought an order for stay on all further proceedings and effect in relation to the respondent's decision pending the full and final disposal of the applicant's application for judicial review to quash the respondent's decision to preserve the status quo of the applicant as the implementation of the decision would result in a large and burdensome amount of taxes being wrongfully and unfairly imposed on the applicant.

Held, allowing the application in encl 35 and granting the order for stay:

(1) The court had an obligation to determine the relevant provisions of the law and could not be restricted to the specific provisions mentioned in the applicant's prayers. When the question was whether the applicant was entitled to the deduction under the ITA, unavoidably, s 33(1) of the ITA was relevant to be considered. The respondent was alleging that the contribution was not deductible whilst the court had held that contribution made to the state government for the release of the Bumiputera lots was deductible under s 33(1) of the ITA in the earlier cases. In the circumstances, there were merits to the applicant's application herein (see para 25).

(2) Further, the question of whether contributions made to the state government for the release of the Bumiputera status was deductible under the ITA involved a question of law and to allow the applicant to raise it after the leave had been granted would not prejudice the respondent. The respondent would have the opportunity to rebut against the averments of the applicant in light of the new development of the law which was not alien to the respondent. The amendment to the notices would allow the parties to assist the court to arrive at a fair and just decision and it would cause injustice should the applicant be disallowed to amend the notices for the purpose of the judicial review. Therefore, it was in the interest of justice that the amendment prayed by the applicant be allowed (see paras 26 & 28).

(3) There was no substantial miscarriage of justice occasioned by the applicant's application herein and the court should not disallow the amendment as the court had the inherent jurisdiction to make any order as may be necessary to prevent injustice. Article 96 of the Federal Constitution states that taxes should only be collected when it is authorised by law. Arbitrary assessment and unjust enrichment could not be allowed. Therefore, an opportunity should be given to the taxpayer to prove that the taxes were not due and payable. Whilst the respondent was given the avenue to reply to the applicant's averments, by contrast, the applicant would suffer great hardship if the application to amend the notices was not allowed. High standard and probity in fair dealing must be afforded by a tax authority to the tax payer (see paras 32, 34 & 39–40).

(4) The taxes imposed by the respondent upon the applicant which amounted to RM13,273,903.67 was indisputably large. This was an enormous amount of money that would result in a financial crisis and cash flow problems for the applicant should the court decline to exercise its inherent jurisdiction to grant a stay. Due to the large sum of additional tax liabilities, which was contended to be of no legal basis in the first place, and where question of law arises ie failure in giving effect to the provisions of the law and earlier decisions of the courts, these were special circumstances that fell within the perimeter set by the judicial principles in granting the stay. The applicant had strong merits in its judicial review application and the applicant would suffer irreparable harm which could not be compensated by damages if a stay was not granted. The balance of convenience lay in the applicant's favour (see para 63).

[Bahasa Malaysia summary

Pemohon memfailkan satu permohonan menurut A 53 k 7 Kaedah-Kaedah Mahkamah 2012 ('KKM'), antara lain, bagi perintah agar pemohon diberi kuasa untuk meminda notis permohonan, pernyataannya di bawah A 53 k 3(2) KKM dan notis pendengaran untuk permohonan semakan kehakiman ('notis-notis tersebut') ('lampiran 35') dan satu perintah penggantungan prosiding sementara menunggu pelupusan permohonan semakan kehakiman. Pemohon, pemaju hartanah telah memasuki perjanjian dengan Kerajaan Negeri Johor di mana pemohon diminta untuk menjual unit perumahan Bumiputera yang dibangunkan oleh pemohon kepada pembeli Bumiputera. Sekiranya pemohon tidak dapat memenuhi syarat tersebut, unit perumahan Bumiputera akan tersedia untuk dijual kepada pembeli bukan Bumiputera dengan syarat terma dalam perjanjian dipenuhi ('perjanjian tersebut'). Berdasarkan perjanjian tersebut, pemohon memohon kepada Kerajaan Negeri Johor untuk melepaskan unit perumahan Bumiputera kepada bukan Bumiputera dan bagi tujuan tersebut, pemohon menyatakan bahawa ia memberikan sumbangan kepada Kerajaan Negeri Johor dan ia bersetuju untuk menerima sumbangan dari pemohon. Responden menjalankan audit cukai ke

atas pemohon dan mengeluarkan surat laporan auditnya untuk tahun taksiran ('TK') 2014 hingga 2017 kepada pemohon. Pemohon menjawab dengan menjelaskan bahawa sumbangan tersebut adalah pembayaran bagi tujuan untuk melepaskan status unit Bumiputera. Responden menolak penjelasan pemohon dan mengemukakan notis penilaian yang dipersoal untuk TK 2017 dan notis penilaian tambahan untuk TK 2014, 2015 dan 2018. Keputusan responden berpunca daripada kedudukannya yang tidak membenarkan jumlah sumbangan bagi pelepasan kuota Bumiputera ('sumbangan') sebagai pengurangan dalam menentukan pendapatan pemohon di bawah s 44(6) Akta Cukai Pendapatan 1967 ('ACP'). Pada 30 September 2020, mahkamah membenarkan kebenaran kepada pemohon untuk semakan kehakiman dan penggantungan interim bagi kesemua prosiding dan kesan selanjutnya terhadap keputusan responden. Melalui lampiran 35, pemohon memohon untuk meminda notis dengan memasukkan perenggan sebagai alternatif permohonan untuk satu pengisytiharan bahawa sumbangan tersebut juga dapat ditolak di bawah s 33(1) Akta Cukai Pendapatan 1967. Pemohon juga memohon satu perintah untuk menggantung kesemua prosiding lanjutan dan kesan berhubung dengan keputusan responden sementara menunggu keputusan penuh dan muktamad pemohon untuk semakan kehakiman untuk membatalkan keputusan responden bagi mengekalkan status quo pemohon kerana pelaksanaan keputusan tersebut akan menyebabkan jumlah cukai yang besar dan membebankan dikenakan secara salah dan tidak adil kepada pemohon.

Diputuskan, membenarkan permohonan lampiran 35 dan membenarkan perintah untuk penggantungan:

(1) Mahkamah mempunyai tanggungjawab untuk menentukan peruntukan undang-undang yang relevan dan tidak seharusnya dihadkan dengan peruntukan khusus yang dirujuk dalam permohonan pemohon. Apabila persoalannya adalah sama ada pemohon berhak mendapat pengurangan di bawah ACP, seharusnya, s 33(1) ACP adalah relevan untuk dipertimbangkan. Responden mendakwa bahawa sumbangan tersebut tidak boleh dikurangkan sementara mahkamah memutuskan bahawa sumbangan yang diberikan kepada kerajaan negeri untuk pelepasan lot Bumiputera dapat dikurangkan di bawah s 33(1) ACP dalam kes-kes sebelumnya. Dalam keadaan tersebut, terdapat merit dalam permohonan pemohon di sini (lihat perenggan 25).

(2) Selanjutnya, persoalan sama ada sumbangan yang diberikan kepada kerajaan negeri untuk pelepasan status Bumiputera dapat dikurangkan di bawah ACP melibatkan persoalan undang-undang dan untuk membenarkan pemohon membangkitkannya setelah kebenaran diberikan tidak akan memprejudiskan responden. Responden berpeluang membantah terhadap dakwaan pemohon berdasarkan perkembangan undang-undang baharu yang tidak asing bagi responden.

Pindaan terhadap notis-notis tersebut akan membenarkan pihak-pihak untuk membantu mahkamah membuat keputusan yang adil dan saksama dan ia akan menyebabkan ketidakadilan sekiranya pemohon tidak dibenarkan untuk meminda notis tersebut bagi tujuan semakan kehakiman. Oleh itu, demi keadilan, pindaan yang dimohon oleh pemohon dibenarkan (lihat perenggan 26 & 28).

(3) Tidak ada ketidakkeadilan yang besar yang disebabkan oleh permohonan pemohon di sini dan mahkamah tidak boleh menolak pindaan tersebut kerana mahkamah mempunyai bidang kuasa sedia ada untuk membuat perintah yang mungkin diperlukan untuk menghalang ketidakadilan. Perkara 96 Perlembagaan Persekutuan menyatakan bahawa cukai hanya boleh dipungut apabila ia dibenarkan oleh undang-undang. Penilaian salah dan pengkayaan yang wajar tidak boleh dibenarkan. Oleh itu, peluang harus diberikan kepada pembayar cukai untuk membuktikan bahawa cukai tersebut tidak perlu dan tidak harus dibayar. Walaupun responden diberi jalan untuk membalas pengataan pemohon, sebaliknya, pemohon akan mengalami kesulitan besar sekiranya permohonan untuk meminda notis tidak dibenarkan. Standard dan kebarangkalian tinggi dalam urusan adil mesti diberikan oleh pihak berkuasa cukai kepada pembayar cukai (lihat perenggan 32, 34 & 39–40).

(4) Cukai yang dikenakan oleh responden ke atas pemohon yang berjumlah RM13,273,903.67 adalah sangat besar. Ini adalah sejumlah besar wang yang akan mengakibatkan krisis kewangan dan masalah aliran tunai bagi pemohon sekiranya mahkamah menolak untuk menggunapakai bidang kuasa sedia ada dalam membenarkan penggantungan. Oleh kerana sejumlah besar liabiliti cukai tambahan, yang mana dianggap tidak mempunyai asas perundangan pada asalnya, dan di mana persoalan undang-undang timbul iaitu kegagalan dalam menguatkuasakan peruntukan undang-undang dan keputusan mahkamah sebelumnya, ini adalah keadaan khas yang berada di dalam perimeter yang ditetapkan oleh prinsip kehakiman dalam membenarkan penggantungan tersebut. Pemohon mempunyai merit yang kuat dalam permohonan semakan kehakimannya dan pemohon akan mengalami kerugian yang tidak dapat dipulihkan yang tidak dapat diganti dengan ganti rugi sekiranya penggantungan tidak dibenarkan. Imbangan kemudahan memihak kepada pemohon (lihat perenggan 63).]

Cases referred to

Abd Hamid bin Jaafar (Trading as Sole Proprietor as Bintang Enterprise) v Shamsiah dan Keluarga Sdn Bhd [2004] 5 MLJ 349, HC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Beauford Baru Sdn Bhd v Gopala Krishnan Vk Gopalan [2002] 6 MLJ 134, HC (refd)

Chang Shu Hua (P) v Goon Fook Hong [2008] 3 MLJ 10; [2008] 3 CLJ 429, CA (refd)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457, CA (refd)
Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473, SC (refd)
Coles and Ravenchear, Re [1907] 1 KB 1, CA (refd)
Cropper v Smith [1884] 26 Ch D 700, CA (refd)
Godfrey Phillips (Malaysia) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan Malaysia [2011] 9 CLJ 670, HC (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)
Kerajaan Malaysia v Ekran Bhd [2006] 2 MLJ 749; [2006] 5 CLJ 92, HC (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105; [1995] 2 CLJ 701, SC (refd)
Kerajaan Malaysia v Margaret Au Nyat Fah [2007] MLJU 608; [2008] 3 CLJ 424, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (folld)
Lembaga Pelabuhan Johor v The Pacific Bank Bhd [1998] 5 MLJ 323; [1998] 1 CLJ 742, HC (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)
Metacorp Development v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447, HC (refd)
Nasioncom Holdings Bhd v Suruhanjaya Sekuriti [2008] 4 MLJ 620, HC (refd)
National Union of Bank Employees v Director General of Trade Unions & Anor [2013] 6 MLJ 167; [2013] 7 CLJ 957, FC (refd)
Omar Suhaimi Abu Hassan v Mahkamah Perusahaan Malaysia & Anor [2014] 3 CLJ 720, CA (refd)
Prima Nova Harta Development Sdn Bhd v Director General Of Income Tax (Appeal No WA-14–7–12 of 2019) (unreported), HC (refd)
R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897, CA (refd)
R v Secretary of State for the Home Department ex parte Simms [2000] 2 AC 115, QBD (refd)
Sovereign Teamwork (M) Sdn Bhd v Director General of Inland Revenue (Case No WA-14–1–01 of 2020) (unreported) (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289, CA (refd)
Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors [2013] 3 MLJ 676; [2013] 3 CLJ 1115, CA (refd)
Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297, CA (refd)

A *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561, CA (refd)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128; [2003] 1 CLJ 210, HC (refd)
Yick Hoe Ferrous Steel Sdn Bhd v Tribunal Rayuan Kastam [2010] MLJU
B 1407; [2011] 7 CLJ 544, IC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967)
Federal Constitution art 96
C Income Tax Act 1967 ss 33(1), 44(6), 103(1), 106(3)
Rules of Court 2012 O 1A, O 2 r 3, O 3 r 5(1), O 53 rr 3(2), 3(5), 5(c), 7, O 92 r 4

S Saravana Kumar (Rosli Dahlan Saravana Partnership) for the applicant.
D *Muazmir bin Mohd Yusof (Nordiana bt Sham) (Revenue Counsel) for the respondent.*

Noorin Badaruddin J:

E **[1]** Enclosure 35 is the application filed by the applicant pursuant to r 7 of the Rules of Court 2012 ('the ROC'), inter alia, for an order that the applicant is authorised to amend the notice of application, its statement under O 53 r 3(2) of the ROC and notice of hearing for judicial review application ('notices').

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[2] Enclosure 35 and an order for stay on all further proceedings and effect in relation to the Respondent's decision in the form of notice of assessment for the year of assessment ('YA') 2017 and notices of additional assessment for the YAs 2014, 2015 and 2018 all dated 12 June 2020 ('decision'), pending the full
G and final disposal of the applicant's application for judicial review to quash the respondent's decision were granted by this court on 15 April 2021. The reasons now follow.

FACTS

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[3] The applicant is a property developer. On 12 November 2012 and 18 December 2016 the applicant entered into agreements with the Johore State Government whereby the applicant is required to sell the Bumiputera housing units developed by the applicant to Bumiputera purchasers. In the event the
I applicant is unable to meet the requirement, the Bumiputera housing units will be made available to be sold to non-Bumiputera purchasers provided the conditions in the agreements were complied with ('agreements').

[4] Pursuant to the agreements, the applicant applied to the Johor State

Government to release the Bumiputera housing units to the non-Bumiputera and for that purpose, the applicant stated that it made contribution to the Johor State Government and the latter agreed to receive the contribution from the applicant.

[5] On 4 March 2020, the respondent conducted a tax audit on the applicant.

[6] On 13 May 2020, the respondent issued its audit finding letter for YA 2014 to 2017.

[7] On 27 May 2020 the applicant responded with a detailed explanation to the respondent. Among others, the applicant explained that the contribution are payments for the purpose of releasing the Bumiputera status units.

[8] On 29 May 2020, the respondent rejected the applicant's explanation. Among others, the respondent alleged that the contribution is not allowable for tax deductions as they are capital expenditure for the right to sell the Bumiputera units.

[9] On 1 June 2020 and 4 June 2020, the applicant responded with a letter maintaining their positions that the contributions are expenses deductible under the ITA.

[10] On 9 June 2020 and 10 June 2020, the respondent, through email, provided the applicant's tax computation for the year of assessment 2014 to 2018.

[11] On 12 June 2020, the respondent disregarded the applicant's explanation and raised the impugned notice of assessment for YA 2017 and notices of additional assessment for the YAs 2014, 2015 and 2018 all dated 12 June 2020. The respondent's decision is consequent to its position of disallowing the contribution amount for the release of the Bumiputera quota ('contribution') as a deduction in determining the applicant's income under s 44(6) of the Income Tax Act 1967 ('the ITA'). According to the respondent, the contribution is not deductible as it is capital in nature.

[12] On 30 September 2020, this court granted leave to the applicant for judicial review and an interim stay of all further proceedings and effect in relation to the respondent's decision.

[13] The applicant was granted leave by this court to file the judicial review application based on the following prayers:

(a) an order for certiorari to respondent's decision in the form of notice of assessment for the year of assessment 2017 and notices of additional assessment for the years of assessment ('YAs') 2014, 2015 and 2018 all dated 12 June 2020 ('decision') on the grounds that the said decision of the respondent was ultra vires, illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable and made without having any regard to the applicant's legitimate expectations, and

(b) a declaration that the respondent is bound by and shall give effect to se 44(6) of the Income Tax Act 1967 ('the ITA') which clearly provides that any gift of money made in the basis year to a State Government or a local authority is deductible for that year in arriving at the total income;

(c) that all further proceedings including the enforcement of the decision be stayed until the full and final determination of the application to quash the decision;

(d) that all necessary and consequential directions and orders be given;

(e) that the costs of this application be costs in the cause; and

(f) all other and further which the court deems fit and proper.

THE APPLICANT'S POSITION

[14] Summarily, the following grounds are put forth by the applicant in making the application via encl 35:

(a) that it is in the interest of justice the application must be allowed and the court has the inherent jurisdiction to make any order as may be necessary to prevent injustice;

(b) that there are clear merits to the application and by disallowing the application will cause injustice upon the applicant and reap the fruits of this judicial review application; and

(c) the respondent will be unjustly enriched at the expense of the applicant.

[15] In regards to the stay application, the following grounds are put forth by the applicant:

(a) special circumstances exist which warrant the exercise of the court's discretion to grant the stay;

(b) balance of convenience favours the granting of the stay;

(c) the applicant's history as a law-abiding, responsible and good corporate taxpayer;

(d) harshness of the threat of civil action should the stay be refused; and

(e) the respondent's failure to exercise its powers according to the provisions in the ITA.

THE RESPONDENT'S OBJECTIONS

[16] Summarily, the respondent submits the following grounds in objecting the applications in encl 35:

(a) there is no proper application/prayer/particularisation for the extension of time sought by the applicant;

(b) no explanation is proffered by the applicant as to the delay in making the application;

(c) the reliance on the decision of the High Court in *Prima Nova Harta Development Sdn Bhd v Director General Of Income Tax* (Appeal No WA-14–7–12 of 2019) (unreported) is not a good reason to grant the extension of time;

(d) the applicant cannot enlarge the reliefs prayed in the leave application once leave was granted for judicial review; and

(e) the amendment will alter the subject matter of the leave which was granted earlier.

[17] In regards to the stay application, the respondent argues there are no special circumstances arising in the applicant's application and as such the stay application ought not be granted.

FINDINGS

[18] The applicant seeks to amend the notices by inserting the following paragraph which states as follows:

> Further, in the alternative, a Declaration that the Contribution amount for the release of the Bumiputera quota ('Contribution') is also deductible under section 33(1) Income Tax Act 1967.

[19] It is the respondent's submission that the applicant did not provide any reason to explain why the prayer was not included in the leave application and why there is delay in filing the amendment. The respondent argued that the applicant cannot merely rely on O 1A of the ROC to justify the non-compliance. The respondent submits that the courts have been consistent in holding that in judicial review, O 1A of the ROC cannot be invoked by the courts. In support of the submission, the respondent relied on the following cases:

A (a) *Omar Suhaimi Abu Hassan v Mahkamah Perusahaan Malaysia & Anor* [2014] 3 CLJ 720;

(b) *Yick Hoe Ferrous Steel Sdn Bhd v Tribunal Rayuan Kastam* [2010] MLJU 1407; [2011] 7 CLJ 544; and

B (c) *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145

[20] According to the respondent, the objection is rightfully raised as the non-compliance is said to be fundamental, mandatory in nature and goes to C the root of the matter and if allowed would cause injustice and prejudice to the respondent. The respondent submits that the amendment is clearly an afterthought. Further, it is argued that the insertion of the declaration in relation to s 33(1) of the ITA is fundamentally and materially different from s 44(6) of the ITA and that basically, the applicant is raising a new argument for D this judicial review against the respondent. It was further argued that as s 33(1) of the ITA is not pleaded in the leave application and did not form part of the order granted for leave, the respondent is caught by surprise and as such the application is said to be an abuse of the court's process. Further, the applicant is said to have failed to seek for an extension of time from the respondent and E the court to file their affidavit in reply and had instead filed the present application.

[21] Foremost, it must be borne in mind that the crux of the applicant's F application herein relates to the issue of whether the contribution made by the applicant to the Johore State Government to procure the approval to sell the Bumiputera lots of houses to the non-Bumiputera are deductible under the ITA. When deductibility of payment made by a company taxpayer becomes the subject matter, the provision of s 33(1) of the ITA will undoubtedly arise G and is relevant. In fact, the applicant at para 7 in its affidavit has stated in the alternative argument that the applicant could deduct the contribution under s 33(1) of the ITA. The deponent on behalf of the applicant avers as follows:

> Selanjutnya sebagai alternative saya dinasihati oleh Peguamcara Pemohon dan sesungguhnya percaya bahawa Sumbangan tersebut juga boleh dibenarkan sebagai H potongan di bawah s 33 (1) ACP kerana ia adalah belanja yang kesemuanya dan semata-mata dilakukan dalam penghasilan pendapatan.

[22] Section 33(1) of the ITA provides:

> 33 Adjusted income generally
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> I (1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including —

(a) subject to subsection (2), any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and —

(i) employed in that period in the production of gross income from that source; or

(ii) laid out on assets used or held in that period for the production of gross income from that source;

(b) rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of producing gross income from that source;

(c) expenses incurred during that period for the repair of premises, plant, machinery or fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensil or article so employed, other than implements, utensils, articles (the expenditure on which would be qualifying plant expenditure for the purposes of Schedule 3) or any means of conveyance, excluding the cost of reconstructing or rebuilding —

(i) any premises, buildings, structures or works of a permanent nature;

(ii) any plant or machinery; or

(iii) any fixtures; and

(d) such other deductions as may be prescribed.

[23] The respondent for that matter is fully aware of the current development of the law through the decisions of the courts where they were in fact the parties therein. It cannot be gainsaid that the respondent is caught by surprise. In at least two cases decided by this court, the facts and issues were similar to the present matter ie the deductibility of the payments made by the company taxpayers to the state government for the release of the Bumiputera lots of the housing projects developed by those companies and s 33(1) of the ITA was one of the provisions which became the relevant issue therein. Therefore, with similar facts with those cases, and by inserting s 33(1) of the ITA as one of the prayers, the applicant cannot be said to raise a new argument.

[24] In *Prima Nova Harta Development Sdn Bhd v Director General Of Income Tax* (Appeal No WA-14–7–12 of 2019) (unreported) and *Sovereign Teamwork (M) Sdn Bhd v Director General of Inland Revenue* (Case No WA-14–1–01 of 2020) (unreported) this court had held that contributions made to the state government for the release of the Bumiputera status is deductible under s 33(1) of the ITA. The court was of the view that by selling the Bumiputera lots to non-Bumiputera, it directly generates the taxpayer's income. However, to be able to do so, the applicant therein needs to return the Bumiputera discount to the state government. In such case, the expenses or payments made by the

applicant therein are 'wholly and exclusively' borne for the purpose of generating income as well as being closely related to the business of the applicant and thus, such expenses should be made deductible under s 33(1) of the ITA. That scenario is similar to the present case as the applicant herein is required to make a contribution to the Johor State Government for the purpose of achieving approval for the release of the Bumiputera quota to be made available for sale to non-Bumiputera.

[25] The court has an obligation to determine the relevant provisions of the law and cannot be restricted to the specific provisions mentioned in the applicant's prayers. At the risk of repetition, when the question is whether the applicant is entitled to the deduction under the ITA, unavoidably, s 33(1) of the ITA is relevant to be considered. The insertion of the declaration in relation to s 33(1) of the ITA will not change the substance of the matter herein as the root of the matter relates to whether the applicant is entitled to the deduction for the year of assessment in regards to its total income and the legality of the respondent's decision. So, when the respondent is alleging that the contribution is not deductible whilst the court has held that contribution made to the State Government for the release of the Bumiputera lots is deductible under s 33(1) of the ITA in the earlier cases, there are merits to the applicant's application herein.

[26] Further, the question of whether contributions made to the state government for the release of the Bumiputera status is deductible under the ITA involves question of law and to allow the applicant to raise it after the leave has been granted will not prejudice the respondent. The respondent will have the opportunity to rebut against the averments of the applicant in light of the new development of the law which is not alien to them. Disclosure of the full facts and basis of the case and the legal principles applicable are necessary so that the court can fully and fairly dispose of this matter. The amendment to the notices will allow the parties to assist the court to arrive at a fair and just decision and it will cause injustice should the applicant be disallowed to amend the notices for the purpose of the judicial review.

[27] Despite the case of *Prima Nova* originated from the Special Commissioner of Income Tax ('SCIT') it is immaterial as the principle derived from the case is good law and is binding upon the respondent. In the case of *Metacorp Development v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447, the applicant therein relied on the Supreme Court and Court of Appeal cases that originated from the SCIT. Rohana Yusuf J (as Her Ladyship then was) in that case held the following:

> [24] Thus the failure of the respondent to follow the decision of the Superior Courts in Penang Realty as well as Lower Perak renders its decision defective. These two cases are binding authorities on the respondent, being an arm of the executive. Also

based on doctrine of stare decisis this court is also bound by the decisions of the superior court. Since the respondent's decision is not based on the legal authorities of the Superior Courts such decision is in excess of its authority.

[28] It is immaterial that the respondent in both the cases of *Prima Nova* and *Sovereign Teamwork (M) Sdn Bhd* had filed an appeal to the Court of Appeal. The decisions of this court remain good law and is binding on the respondent. In congruence with the current development of the law, it is in the interest of justice that the amendment prayed by the applicant be allowed. In the case of *Lembaga Pelabuhan Johor v The Pacific Bank Bhd* [1998] 5 MLJ 323; [1998] 1 CLJ 742 Abdul Malik Ishak J stated as follows:

Now, leave to amend the statement of defence like the proposed amendments will definitely be granted to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff notwithstanding the fact that this might lead to an additional delay and expense and the trial will be protracted (*Application des SA v Falks Veritas Ltd* [1974] Ch 381; [1974] 3 All ER 51 CA).

[29] Under O 1A of the ROC the court shall have regard to the overriding interest of justice and not only to the technical non-compliance with the Rules. O 1A of the ROC provides:

ORDER 1A — COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

Regard shall be to justice (O 1A)

In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[30] In the spirit of O 1A of the ROC this court is reminded of the decision of the Court of Appeal in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 where the appeal of the judgment creditor against the decision of the High Court that found the bankruptcy notice was invalid as it was filed out of time under the Bankruptcy Act 1967 was allowed. Albeit the case relates to the procedural requirement under the Bankruptcy Act 1967 what is pertinent to note is when the Court of Appeal cited the case of *Cropper v Smith* [1884] 26 Ch D 700 where Bowen LJ had stated the followings:

... there is a power even in that statute for a Judge at Chambers to amend, and to allow you at the last moment to cure any laches or error of judgment, and what a judge could do at Chambers, a Judge could do in Court. Moreover, every power of amendment given by the Judicature Act seems to me to be applicable to this kind of suit as well as to any other. Now, I think *it is a well- established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights*. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, *I know of*

no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace (Emphasis added.)

[31] Apart from O 1A of the ROC, the court may grant leave under O 53 r 7 of the ROC which states:

> 7 Amendment (O 53, r 7)
>
> (1) The Judge may allow the statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party. (2) Every party to the application must supply to any other party copies of the affidavits which he proposes to use at the hearing.

[32] It is of the considered view that there is no substantial miscarriage of justice occasioned by the applicant's application herein and the court shall not disallow the amendment notwithstanding any preliminary objection raised. Order 2 r 3 of the ROC states that:

> 3 Preliminary objection for non-compliance of rules not allowed (O 2, r 3)
>
> A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both.

[33] In *Beauford Baru Sdn Bhd v Gopala Krishnan Vk Gopalan* [2002] 6 MLJ 134 in citing O 2 r 3 of the ROC, the court stated the following:

> It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

[34] In addition to the above provisions, this court has the inherent jurisdiction to make any order as may be necessary to prevent injustice. Order 92 r 4 of the ROC provides:

> 4 Inherent powers of the Court (O 92, r 4)

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[35] Accordingly, it cannot be disputed that this court has the power and inherent jurisdiction to grant an extension of time. The applicant has stated the reasons for the amendment to include amongst others, an extension of time for the applicant to make the said amendments as follows:

The grounds of this application are, inter alia, as follows:

(a) The applicant's application for an extension of time to amend the Notices is on a bona fide basis and it is not frivolous whereby the applicant has no intention to delay the Honorouble Court's time or to disobey the Court's instruction.

[36] In *R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 All ER 897, it was held that:

The county court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend any time limits attaching to an order granted at an earlier hearing by a different judge. *The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed*. (Emphasis added.)

[37] Our courts have on numerous occasions held that the court must decide the case in the interest of justice which far outweighs any procedural technicality. In *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 the Federal Court had held that:

The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done ... The Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

[38] Low Hop Bing J (as he then was) in *Abd Hamid bin Jaafar (Trading as Sole Proprietor as Bintang Enterprise) v Shamsiah dan Keluarga Sdn Bhd* [2004] 5 MLJ 349 had eloquently stated as follows:

As we move towards the era of facilitating the process of litigation, the raising of preliminary objections on technical grounds would certainly and clearly be a thing of the past. The Court of Appeal in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 through the authoritative judgment of Ahmad Fairuz JCA (now CJ Malaysia) expressly stated that the preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving, thereby overruling the procedural technical objection.

[39] It is apposite to bear in mind that art 96 of the Federal Constitution

states that taxes should only be collected when it is authorised by law. Arbitrary assessment and unjust enrichment cannot be allowed. As such the court must draw a balance between the interests of the taxpayer like the applicant and the state like the respondent. The Supreme Court in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 had held that:

> ... Matters of this nature involve, inter alia, balancing the need of the Government to realise the taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments ... The court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment.

[40] This court agrees with the applicant's submission that opportunity should be given to the taxpayer to prove that taxes are not due and payable. Whilst the respondent is given the avenue to reply to the applicant's averments, by contrast, the applicant will suffer great hardship if this application to amend the notices is not allowed. High standard and probity in fair dealing must be afforded by a tax authority to the tax payer.

[41] Order 3 r 5(1) of the ROC provides that the court may as it thinks just extend the period which a person is required by rules, judgment, or order to do any act in proceedings. In *National Union of Bank Employees v Director General of Trade Unions & Anor* [2013] 6 MLJ 167; [2013] 7 CLJ 957 the Federal Court held that:

> On the first question the learned High Court judge correctly stated that even though there is no 'in built' provision to extend time, the extension of time is provided under O 3 r 5 of the RHC which is the general provision which confers upon the court the discretion to extend time ...

[42] The Court of Appeal in *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297 held that:

> Under O 3 r 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry of the period. The primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

[43] The UK Court of Appeal in *Re Coles and Ravenchear* [1907] 1 KB 1 had the following to say with regards to an applicant's application for an extension of time to appeal at the Court of Appeal:

> Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to

be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

[44] Since there are two stages involved in application for judicial review where the applicant who succeeds at the threshold stage will have to file the notice of application for judicial review thereafter, it is of the considered view that encl 35 is an interlocutory application before the hearing of the substantive stage. The applicant has in its intitulement gave notice to the respondent on the type of the application made including the provisions relied upon as follows:

NOTICE OF APPLICATION

(For leave to amend the notice of application, Statement Filed Pursuant to Order 52 Rule 3(2) and Notice of Hearing for Judicial Review Application and/or for an extension of time for leave to amend the notice of application, Statement filed pursuant to Order 53 Rule 3(2) and Notice of Hearing for Judicial Review Application under Order 53 Rule 3, Order 53 Rule 7, Order 92 Rule 4 and Order 1A of the Rules of Court 2012).

[45] This court can issue further directions to the applicant to amend its intitulement if need be. In the case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 cited by the respondent, the Court of Appeal had allowed the applicant to rectify such mistake and held the following:

In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise, it would be an embarrassing pleading and be may be liable to be struck out, *unless sooner amended*. (Emphasis added.)

[46] This court is satisfied that the applicant has requested leave to amend the notices evident from the following paragraph of encl 35:

(1) THAT the applicant be given leave to amend the notice of application, Statement filed pursuant to Order 53 Rule 3(2) and Notice of Hearing for Judicial Review Application ('the Notices') by this Honorouble Court.

[47] The cases cited by the respondent in support of its objections overall relate to the failure to plea a specific claim which was held to be detrimental. To the contrary, the applicant had clearly pleaded for leave to be granted as stated in the above.

[48] Based on the above, this court had allowed the applicant's application to amend the notices.

A STAY APPLICATION

[49] It has been established that a decision made by a public decision-making body could be stayed by an order of the court pending judicial review of the said decision. Order 53 r 3(5) ROC provides that:

B

> (5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

[50] The High Court in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; [2003] 1 CLJ 210 had held that:

C

> The phrase 'a stay of the proceedings' must have a wider application. It does not confine to proceedings in a court only. Today, many applications for judicial review are for orders of certiorari to quash decisions of decision-making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus the phrase 'a stay of the proceedings' in relation to such bodies must mean 'a stay of the process by which the decision challenged has been reached, including the decision itself.'... Thus, as had been decided in Ex parte Avon County Council, a decision made by an officer or minister of the crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a stay of a decision of a decision-making body pending the conclusion of a challenge to the decision- making process by way of judicial review.

D

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F **[51]** In determining whether a stay of the decision ought to be granted in judicial review proceedings, the special circumstances test as laid out by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 applies. In *Nasioncom Holdings Bhd v Suruhanjaya Sekuriti* [2008] 4 MLJ 620, the court held:

G

> [16] It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion and consequently pursuant to O 53 r 3(5) of the RHC which states, 'The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question' is likewise discretionary.

H **[52]** The Court of Appeal in *Chang Shu Hua (P) v Goon Fook Hong* [2008] 3 MLJ 10; [2008] 3 CLJ 429 acknowledged that the category of what constitutes special circumstances is not closed, and ought to be interpreted flexibly. The court stated:

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> [34] Other factors must be taken into account in applying the special circumstances approach. These factors, and they are not exhaustive, may be listed as follows:
>
> (a) whether damages would be an adequate remedy if the applicant who applies for the stay succeeds in his appeal?
>
> (b) the public policy consideration that has to be taken into account;

(c) the need to examine the subject matter of the appeal;

(d) the need to weigh in a balance of the hardship of the parties involved;

(e) the delay in filing the application for a stay;

(f) whether the court would exercise its inherent jurisdiction to grant the stay; and

(g) where would the balance of convenience or the balance of justice lie?

[53] In *Godfrey Phillips (Malaysia) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan Malaysia* [2011] 9 CLJ 670, the High Court observed the difference between a stay of execution of a decision of a public body and a stay of execution of a judgment of a court as follows:

> [28] It must be noted that a stay of the proceedings as in a suspension of a unilateral ex parte decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full blown trial and a determination on the merits have been made inter partes. An attempt to equate the two processes would be inappropriate.
>
> [29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the first respondent from acting on the impugned decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant.

[54] The Court of Appeal in the judicial review case of *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676; [2013] 3 CLJ 1115 later confirmed the principles enunciated in *Godfrey Phillips*.

[55] In relation to tax matters, the existence of the provisions of ss 103(1) and 106(3) of the ITA does not prohibit the court's jurisdiction to grant stay until the full and final determination of the judicial review application pursuant to the court's inherent jurisdiction. Sections 103(1) and 106(3) ITA state as follows:

> 103 Payment of tax
>
> (1) Except as provided in subsection (2), tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment.
>
> 106 Recovery by suit

A (3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(1A), (3), (4), (5), (6), (7) or (8).

B **[56]** In *Kerajaan Malaysia v Jasanusa Sdn Bhd*, the Supreme Court in applying its earlier decision in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 has clearly stated that:

C With respect, in our view, neither s. 103 (l) nor s. 106 (3), bars a Court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case. (See Supreme Court decision in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 at p 475 Col 2, last para, per Gunn Chit Tuan CJ).'

D **[57]** The grant of stay pending the disposal of the proceedings is discretionary. In *Kerajaan Malaysia v Ekran Bhd* [2006] 2 MLJ 749; [2006] 5 CLJ 92 the High Court has stated that:

... It is not disputed that the power to grant stay of proceedings or execution pending appeal is a discretionary exercise of power premised on s 73 of the Courts of Judicature Act 1964.

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[58] In *Kerajaan Malaysia v Margaret Au Nyat Fah* [2007] MLJU 608; [2008] 3 CLJ 424 the court took the view that some of the respondent's powers to take civil action against taxpayers appear to be amongst the harshest amongst all civil laws, and that some of the measures taken to collect taxes may be seen to be oppressive. Accordingly, the court would not be restricted from granting a stay if the facts warrant it. Hamid Sultan Abu Backer J (as he then was) stated as follows:

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G Section 106 (3) of the ITA 1967 states: 'In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103 (4), (5) or (5A).' This section, to some extent in my view, is in breach of natural justice and violates the spirit of the Federal Constitution. A judgment obtained on an erroneous assessment which the defendant cannot honour may lead him to be made a bankrupt and/or to financial ruin. Among all civil laws, this appear to be the harshest and some of the measures taken to collect taxes as on the facts of this case are prima facie seen to be oppressive. For example, in this case, the administratrix was deprived from travelling overseas when the tax due and owing was not personal to her. When there is an abuse such as this, the court must readily act to provide the remedy to the victim. In this instance, the court is obliged to grant the judgment, as per the law. However, the court is not restricted from granting a stay of the judgment, if the facts of the case warrant so.

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[59] In exercising the discretion, the court would need to consider whether there are special circumstances which warrant a stay of the proceedings.

Support is drawn from the oft-quoted case of *Kosma Palm Oil Sdn Bhd*. It is of the considered view that 'special circumstances' is just an expression to denote a combination of factors that persuade the court that it would be just and appropriate to grant a stay. It must also be borne in mind that the granting of a stay does not relieve the applicant from the liability from the payment of the tax assessed but is merely a stay on the enforcement until the decision of the judicial review has been reached. The power of the court to grant an order for stay lies within O 53 r 5(c) and/or O 92 r 4 of the ROC.

[60] It is trite law that a subject's recourse to the court for the determination of his rights is not to be excluded unless by clear and express words (see *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81), and there has been a plethora of cases which support the view that where rights are taken away by legislation this should be done by clear explicit terms. In *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, Lord Hoffman stated as follows:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[61] There is no explicit ouster clause within the ITA that limits the court's inherent powers to grant stay as the granting of a stay does not relieve the applicant from the liability of the tax. This means preserving the status quo by suspending the decision under challenge pending the determination of this judicial review application, which as a result, will not deny the applicant the full benefit of a successful challenge.

[62] The respondent's contention that the stay order sought by the applicant is in the nature of an injunction does not stand as it is trite that the grant of stay in judicial review is not the same as an injunction. It should be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. The applicant is applying for a stay of the respondent's decision to preserve the status quo pending the full and final determination of the applicant's judicial review application. It is not a temporary injunction to restrain the respondent from enforcing its decision (see *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289).

[63] In the present application, the applicant urges this court to preserve the status quo of the applicant prior to the respondent's decision as the implementation of the decision will result in a large and burdensome amount of taxes being wrongfully and unfairly imposed on the applicant in a manner that should not be sanctioned by the court. The taxes imposed by the respondent upon the applicant amounts to RM13,273,903.67 is indisputably large. This is an enormous amount of money that will result in a financial crisis and cash flow problems for the applicant should the court decline to exercise its inherent jurisdiction to grant a stay. Due to the large sum of additional tax liabilities, which is contended to be of no legal basis in the first place, and where question of law arises ie failure in giving effect to the provisions of the law and earlier decisions of the courts, these are special circumstances that falls within the perimeter set by the judicial principles in granting stay. There is no dispute of facts in the present matter. The question of law that is of concern is whether the respondent can disallow the applicant to deduct the contribution amount for the release of the Bumiputera quota as a deduction under ss 44(6) or 33(1) of the ITA. It is of the considered view that the applicant has strong merits in its judicial review application and the applicant will suffer irreparable harm which cannot be compensated by damages if a stay is not granted. The balance of convenience lies in the applicant's favour.

CONCLUSION

[64] Premised on the reasons set out in the above, this court had granted order in terms of encl 35 and an order for stay on all further proceedings and effect in relation to the respondent's decision.

Application allowed and an order for stay granted.

Reported by K Selvaraju